



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable George H. Sheppard  
Comptroller of Public Accounts  
Austin, Texas

Dear Sir:

Opinion No. G-4405A  
Re: Gross Receipts Tax  
upon sale of radios  
and cosmetics.

In your letter of February 9, 1942, you direct our attention to Article 10 of House Bill No. 8, 47th Legislature, and submit to us for our opinion the following:

"It appears to be the practice of people engaged in the sale of cosmetics and radios to add two per cent to the sale price of the article and collect that much in addition when the sale is made and report the two per cent collected as the tax due this Department. The question has arisen as to whether or not the tax also applies against the additional amount collected at the time of the sale. For example: a dealer sells a radio at the sale price of \$100 but he collects \$102 from the customer. Should the seller base his tax on the sale price of \$100 or on the amount of \$102 actually collected?"

The first and last paragraphs of Section 1, Article 10, House Bill No. 8, 47th Legislature, read as follows:

"Each person, partnership, association, or corporation selling at retail new radios or new cosmetics, shall make quarterly on the first days of January, April, July, and October of each year, a report to the Comptroller, under oath of the owner, manager, or if a corporation, an officer thereof, showing the aggregate gross receipts from the sale of any of the above-named items for the quarter next preceding; and shall at the same time pay to the Comptroller a luxury excise tax equal to two (2) per cent of said gross receipts as shown by said report. . .

"Nothing herein shall be construed so as to require payment of the tax on gross receipts herein levied more than once on the proceeds of the sale of the same article of merchandise. A retail sale as used herein, means a sale to one who buys for use or consumption, and not for resale. Gross receipts of a sale means the sum which the purchaser pays, or agrees to pay for an article or commodity bought at retail sale."

The tax levied by the above section of H. B. No. 8 is a gross receipts tax, not a sales tax. It is not levied against the retail purchaser. Notwithstanding that he may be required to pay to the seller a greater amount on account of the tax, the requirement is one which is made by the seller and not by the taxing statute. The purchaser does not under such circumstances pay the tax. He is merely paying more for the merchandise. The tax is paid later. From *Lash's Products Company v. United States*, 278 U. S. 178, 73 L. Ed. 251, we quote:

"This is a suit to recover the amount of certain taxes paid under the Revenue Act of 1918 (Act of February 24, 1919, c. 18, § 628, 40 Stat. 1057, 1116). By § 628 there is imposed on 'soft drinks,

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sold by the manufacturer, \* \* \* in bottles or other closed containers, a tax equivalent to 10 per centum of the price for which so sold. This tax was paid by the petitioner, calculated at ten per centum of the sum actually received by it for the goods sold. But the petitioner had notified its customers beforehand that it paid the ten per cent tax and it contends that in this way it passed the tax on and that the true price of the goods was the sum received less the amount of the tax. The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. Eckman & Co. v. I. S. Daves & Son Co., 12 F. (2d) 154. The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. (Underscoring ours)

We cite also People vs. Werner, 5 H. E. (2) 238, Ill.; Elmer Candy Co. vs. Fauntelroy, 19 Fed. (2) 664.

Our answer to your question is that the seller should base his tax on the sale price of \$102.00 on the fact case presented.

This opinion is in lieu of our Opinion No. O-4403, which is withdrawn.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

*Glenn R. Lewis*

Glenn R. Lewis  
Assistant

APPROVED MAR 14, 1943

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GRL:MET

